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8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE DISTRICT OF ARIZONA**

10 Hector Lopez, an individual  
11 Plaintiff,  
12 vs.  
13 COII Bollweg et al.,  
14 Defendants.

**CASE NO. 4:13-CV-00691-DCB**

**RULE 59 MOTION FOR NEW TRIAL**  
**(Hearing Requested)**

**HON. DAVID C. BURY**

15 Pursuant to Rule 59, Federal Rules of Civil Procedure, Plaintiff, Hector  
16 Lopez, hereby moves for a new trial in the above captioned matter.

17 For the reason more formally set forth in the following Memorandum of  
18 Points and Authorities, Plaintiff's Motion for New Trial should be granted.  
19

20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **I. Procedural Background**  
22

23 This case was filed on July 22, 2013. On March 31, 2015, the Court denied  
24 the Motion to Dismiss claims against Defendants Bennett and Swaney (Doc. 64). In  
25 that order, the Court dismissed multiple defendants, but denied the motion to  
26

1 dismiss as to Defendants Bennett, Suarez, Robinson, and Swaney. (Doc. 64 at P.  
2 11).

3  
4 The remaining Defendants filed a Motion for Summary Judgment on  
5 November 18, 2016. (Doc. 108). On June 26, 2017, the Court issued its Order.  
6 (Doc. 125). The order dismissed defendants' Robinson and Suarez. The Court held  
7 that fact questions precluded summary judgment in favor of defendants' Bennett  
8 and Swaney.  
9

10 The Court pointed out that,  
11

12 “Knowledge of a specific diagnosis is not required for a  
13 prison official to be aware of a risk of serious harm.  
14 Moreover, the record shows that nurses could not make  
15 an assessment or diagnosis; thus, Plaintiff could not get  
16 any diagnosis until he saw a doctor, which he alleges  
17 Defendants prevented.” (Doc 125 at 9:24-27)

18 The Court correctly held that,  
19

20 “Believing Plaintiff’s allegations regarding his condition,  
21 a jury could find that Defendants knew of Plaintiff’s  
22 serious medical need from the fact that it was obvious.”  
23

24 The Court noted that believing Mr. Lopez’s evidence, Defendants had the  
25 ability to initiate an ICS even if the line nurses did not act. Likewise, the  
26 Defendants has an ability to call a superior. (Doc. 125 at 12 and 16). The Court  
further found that Defendant Swaney’s intentional conduct, withholding medical

1 care absent a confession to a disciplinary violation (drinking “hooch”) was also a  
2 fact question for the jury to decide. (Doc. 125 at 17:12-20).

## 3 4 **II. Rule 50 Standard**

5 Rule 50 provides that a court may grant judgment as a matter of law once a  
6 party has been fully heard on an issue and the court finds that "a reasonable jury  
7 would not have a legally sufficient evidentiary basis to find for the party on that  
8 issue[.]" Fed. R. Civ. P. 50(a)(1). The Rule 50 standard mirrors the standard for  
9 granting summary judgment under Rule 56 - "the inquiry under each is the same."  
10  
11 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

12  
13 In deciding a Rule 50 motion, "the court '**may not make credibility**  
14 **determinations or weigh the evidence.**'" *E.E.O.C. v. Go Daddy Software, Inc.*,  
15 581 F.3d 951, 961 (9th Cir. 2009) (quoting *Reeves v. Sanderson Plumbing Prods.,*  
16 *Inc.*, 530 U.S. 133, 149-50 (2000)) (Emphasis Added). Rather, the court "must view  
17 the evidence in the light most favorable to the nonmoving party . . . and draw all  
18 reasonable inferences in that party's favor." *Reeves*, 530 U.S. at 150. The test is  
19 whether, "under the governing law, there can be but one reasonable conclusion as  
20 to the verdict." *Anderson*, 477 U.S. at 250.

## 21 22 23 **III. Rule 50 Hearing**

24  
25 This Court granted the Defendants’ Rule 50 motion after the close of  
26 Plaintiff’s case. The court stated,

1 “So even on the merits, I can’t see where a reasonable  
2 jury would have sufficient - - a sufficient evidentiary  
3 basis to find, the way the law defines it, that they were  
4 deliberately indifferent. Could these folks have done  
5 better? Well, we can always do better. Were they  
6 indifferent? I don’t really think they were. But even if  
7 they were indifferent, there is absolutely no evidence that  
8 they made a conscious choice to disregard the need for  
9 medical care.

10 “I think if the jury - - if this case went to a jury, it would  
11 be manifest injustice for them to find liability against  
12 these security officers.” Hearing Transcript at 6:1-12.  
13 (Exhibit 1)

14 The Court explained its main reasoning as,

15 “We have the first witness in this case, a - - not a doctor,  
16 but a physician’s assistant, and I thought he was quite  
17 knowledgeable and credible, who testified directly that:  
18 the nursing staff at this institution was very talented; they  
19 didn’t perceive any emergency, and yet you expect  
20 security officers to see that and to respond it; that the  
21 disease is rare; that the disease is difficult to diagnose;  
22 that I think almost at all times the vital signs as presented  
23 by Mr. Lopez were in normal limits; that he was seen  
24 during this relevant period of time, between July 26 and  
25 August 2, six times.” Hearing Transcript at 4:20-5:5.

#### 26 **IV. Facts Adduced at Trial**

**Nick Salyer, P.A.** Mr. Salyer testified at trial that:

- 23 1. When he saw Mr. Lopez, he was concerned that the disease had  
24 progressed to the point where Mr. Lopez could die.
- 25 2. Botulism is a progressive disease if enough toxin is ingested.

1 3. Some open and obvious botulism symptoms a victim could experience  
2 included droopy eyes, facial paralysis, breathing difficulties, and  
3 difficulty moving extremities.  
4

5 4. Mr. Lopez was not seen by someone authorized to diagnose and treat Mr.  
6 Lopez until Mr. Lopez was brought to see Mr. Salyer on August 2, 2012.  
7

8 5. Mr. Salyer may have been able to diagnose Mr. Lopez by July 28, 2012 if  
9 Mr. Lopez had been brought in to see him.  
10

11 **Gabriel Suarez.** Mr. Suarez testified at trial that:

12 1. He was concerned about Mr. Lopez, Mr. Montijo, and Mr. Aceves.

13 2. Mr. Suarez personally went to each inmate and picked up Health Needs  
14 Requests, in hopes of getting the inmates to someone able to diagnose and  
15 treat these three inmates.  
16

17 3. Mr. Suarez was concerned that the inmates had a contagious disease that  
18 could spread to the community.  
19

20 **Henry Bollweg.** Mr. Bollweg's deposition testimony was read into the  
21 record. Mr. Bollweg's testimony established that:

22 1. He called an ICS for Mr. Lopez because Mr. Lopez needed emergency  
23 assistance.  
24

25 2. Part of a prison guard's duties include protecting the lives of the inmates.  
26

1 3. Guards can initiate an ICS or contact a supervisor to obtain medical care  
2 if the nurses are not responding to an inmate's complaints.  
3

4 4. That ICS's are typically videotaped.

5 **Hector Lopez.** Mr. Lopez testified that:

6 1. His symptoms were open and obvious, including droopy eyes, facial  
7 paralysis, breathing difficulties, and he had difficulty moving his arms  
8 and legs.  
9

10 2. He was videotaped during Mr. Bollweg's ICS.  
11

12 3. Mr. Bennett and Mr. Swaney were told the nursing staff were not treating  
13 Mr. Lopez.  
14

15 4. Mr. Bennett and Mr. Swaney did not initiate an ICS nor attempt to obtain  
16 medical treatment after hearing that Mr. Lopez was not being treated.  
17

18 5. Mr. Swaney threatened to pepper spray Mr. Lopez if Mr. Lopez continued  
19 asking for medical treatment.  
20

21 6. Before seeing Mr. Salyer, Mr. Lopez was required to confess to drinking  
22 hooch.

23 **Mr. Bennett.** Mr. Bennett testified that:

24 1. He did not initiate an ICS.

25 2. He did not seek out a supervisor.  
26

1 3. According to ADC records there was a video camera present during the  
2 ICS called for Mr. Lopez.

3  
4 4. Sergeants had access to the videotaped footage.

5 **Mr. Swaney.** Mr. Swaney testified that:

6 1. He did not initiate an ICS.

7  
8 2. He was a sergeant.

9 3. Sergeants had access to the videotaped footage of Mr. Lopez's ICS.

10 4. He was ordered by the Deputy Warden to arrange for Mr. Lopez to go to  
11 the medical unit.

12  
13 5. He was ordered to obtain a confession from Mr. Lopez that Mr. Lopez  
14 drank hooch so that Mr. Lopez could be charged the cost of medical  
15 treatment.  
16

17 **Documentary Facts.** The guards were required to follow Arizona  
18 Department of Corrections ("ADOC") rules and regulations. These rules were  
19 admitted into evidence: DO 807.08 "Intervention", which provides in subsection  
20 1.1:  
21

22 **All staff shall assess and render aid to ALL medical**  
23 **emergencies**, including suicide attempts, as soon as  
24 possible or within no longer than 3 min. of becoming  
25 aware of a non-responsive inmate or **an inmate in**  
26 **medical crisis**. (Emphasis added).

Furthermore, subsection 1.3 provides in relevant part:

1 “In the event that an inmate is found . . . in a state of  
2 medical emergency . . . staff shall assess the situation and  
3 shall render in-cell aid as soon as possible or within no  
4 longer than three minutes of becoming aware of the  
situation.”

5 DO 1100 provided in relevant part:

6 “Health care shall be delivered through a joint effort of  
7 Inmate Health Services and security operations.”

8 Additionally, it was undisputed that the ICS videotape Mr. Swaney had  
9 access to disappeared.  
10

## 11 **V. Legal Argument**

12 In a case like this, a plaintiff must prove that the defendants were 1)  
13 deliberately indifferent 2) to a serious medical need 3) that harmed the plaintiff. If  
14 such evidence exists, then the defendants can be held responsible under 42 U.S.C.  
15 §1983.  
16

17  
18 There is both an objective, and a subjective, prong to the 8<sup>th</sup> Amendment  
19 violation analysis:

20 “To violate the Eighth Amendment, the deprivation  
21 alleged must objectively be sufficiently serious; and the  
22 prison official must subjectively have a sufficiently  
23 culpable state of mind.” *Estate of Ford v. Ramirez-*  
24 *Palmer*, 301 F.3d 1043 (Fed. 9th Cir., 2002), citing  
25 *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970,  
128 L.Ed.2d 811 (1994).

26 The first prong is objective: “did the inmate have a sufficiently serious

1 medical condition?” The second prong is subjective: “was the defendant  
2 deliberately indifferent?”

3  
4 **1. The Defendants Admit Plaintiff Suffered from a Sufficiently  
5 Serious Medical Condition.**

6 It is undisputed that Mr. Lopez was suffering from a sufficiently serious  
7 medical condition. Mr. Lopez contracted botulism, a potent, life-threatening toxin.  
8 The defendants wrote in their 2016 Motion for Summary Judgment,  
9

10 “Defendants do not dispute that contracting botulism  
11 creates a serious medical need . . .” *Motion for Summary  
12 Judgment* at page 7, lines 22-23. (Doc. 105).

13 Accordingly, there is no further need to analyze the objective prong.

14 **2. There is Admissible Evidence that the Defendants had a  
15 Sufficiently Culpable State of Mind.**

16 A prison official has a sufficiently culpable state of mind if they are  
17 deliberately indifferent to a serious medical need. A sufficiently culpable mind  
18 exists when a Defendant denies or delays access to medical treatment.  
19

20 **i. A Final Botulism Diagnosis is Unnecessary to Establish  
21 Deliberate Indifference**

22 One of the Court’s reasons for granting the Rule 50 motion was that  
23 Botulism is a difficult to diagnose condition. This is not the standard. The question  
24 is, were the symptoms open and obvious, or did the guards know (or have reason to  
25 know) that Mr. Lopez was not being treated for an objectively serious medical  
26

1 condition. Mr. Lopez provided evidence that his symptoms were open and obvious.  
2 The Defendants denied Mr. Lopez's evidence. That created a fact question for the  
3 jury to decide since the inferences must be weighed in Mr. Lopez's favor.  
4

5 What is more, its long established that non treatment for a potentially  
6 communicable disease – what Mr. Bennett and Mr. Suarez testified existed, is more  
7 than sufficient to mandate actual medical treatment, even without symptoms.  
8

9 “We would think that a prison inmate also could  
10 successfully complain about demonstrably unsafe  
11 drinking water without waiting for an attack of dysentery.  
12 Nor can we hold that prison officials may be deliberately  
13 indifferent to the exposure of inmates to a serious,  
14 communicable disease on the ground that the  
complaining inmate shows no serious current  
symptoms.”

15 *Helling v. Kinney*, 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993) at 33.

16 “Indifference ‘may appear when prison officials deny,  
17 delay or intentionally interfere with medical treatment, . .  
18 .’” *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir., 2006),  
19 citing *Hutchinson v. United States*, 838 F.2d 390, 392  
20 (9th Cir. 1988). See also: *Estelle v. Gamble*, 429 U.S. 97,  
104 (1976).

21 The Court is required to apply the same standard in determining a Rule 50  
22 Motion as in determining a Motion for Summary Judgment. Here, the evidence,  
23 taken together, must be determined in favor of the non-moving party, Mr. Lopez.  
24

25 “We must view the evidence in the light most favorable to  
26 the non-moving party, and then ask whether there is any  
"genuine dispute as to any material fact" under the

1 governing substantive law.” *Hamby v. Hammond*, 821  
2 F.3d 1085, 1090 (9th Cir., 2016).

3 The Court is not permitted to weigh the evidence and decide as a matter of  
4 law that Mr. Lopez’s testimony, and other related evidence, about his symptoms  
5 being open and obvious was insufficiently credible. With that standard in mind,  
6 there was more than enough evidence for the jury to weigh and determine what  
7 evidence was more credible, Plaintiff’s or Defendants’.  
8  
9

10 **ii. No One Provided Medical Treatment Until August 2, 2012.**

11 It was also undisputed at trial that Mr. Lopez was not diagnosed or treated  
12 until August 2, 2012. The taking of vitals is a cursory care. It does not diagnose any  
13 disease. It does not provide any treatment. Cursory care is equivalent to no  
14 treatment at all.  
15

16 “Deliberate indifference can also occur where the care  
17 given is so cursory as to amount to no treatment at all.  
18 See *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700,  
19 704 (11th Cir. 1985).” *Parzyck v. Prison Health Services,*  
20 *Inc.*, No. 07-14715 (11th Cir. 8/21/2008) (11th Cir.,  
2008)

21 Not a single piece of evidence suggested that Mr. Lopez was diagnosed or  
22 treated for any illness before August 2, 2012. The simple truth is, the Defendants  
23 did not rely on any medical opinion, since **it is undisputed there was no medical**  
24 **opinion reached until the afternoon of August 2, 2012.**  
25

26 This violates the constitution. See e.g. *Iko v. Shreve*, 535 F.3d 25, 242–43

1 (4th Cir. 2008) (failing to get a collapsed, pepper sprayed inmate medical attention  
2 even though a nurse was present does not permit a qualified immunity claim).

3  
4 In deciding the Rule 50 Motion, the Court must look to whether admissible  
5 evidence existed that contradicted the defendants' story. If so, it creates a fact issue  
6 for the jury to decide.  
7

8 “Whether a prison official had the requisite knowledge of  
9 a substantial risk is a question of fact subject to  
10 demonstration in the usual ways, including inference from  
11 circumstantial evidence, cf. Hall 118 (cautioning against  
12 “confusing a mental state with the proof of its existence”),  
13 and **a factfinder may conclude that a prison official  
14 knew of a substantial risk from the very fact that the  
15 risk was obvious.**” *Farmer v. Brennan*, 511 U.S. 825,  
16 842 (1994). (Emphasis added).

17 In other words, the deliberate indifference analysis does not turn solely on  
18 the individual correctional officer's testimony. Normal evidentiary standards  
19 apply, including proof through circumstantial evidence, that the defendants knew,  
20 or had reason to know, that Mr. Lopez was not being treated.

21 This case would be different if Mr. Lopez had seen PA Salyer, and the illness  
22 was misdiagnosed (i.e. diagnosing Mr. Lopez with a cold or the flu) and the  
23 correctional officers relied on Mr. Salyer's expertise. But they did not rely on  
24 anyone's expertise.

25 Under the Defendants theory of the case, the mere existence of “med pass”  
26 nurses essentially eliminates any duty under the ADC rules and regulations and the

1 duties imposed by the Constitution – even when no treatment is provided.

2           **A. The Missing Videotape was under Sgt. Swaney's Control and**  
3  
4           **Disappeared.**

5           It was undisputed at trial that a videotape existed. It was undisputed at trial  
6 that the videotape disappeared. The videotaped ICS was good evidence to show the  
7 nature and extent of Mr. Lopez's condition. This court noted in its Ruling on the  
8 Motion for Summary Judgment that a spoliation order might be warranted. This  
9 Court later ruled that it would not permit a spoliation instruction – but allowed Mr.  
10 Lopez to build a case for the instruction. To establish the viability of the  
11 instruction, Mr. Lopez needed to prove that a videotape existed. That evidence was  
12 admitted and uncontested at trial. The next step was establishing that one or both  
13 defendants had access, and the ability, to destroy the videotape. That evidence was  
14 established when Mr. Suarez, Mr. Bennett, and Mr. Swaney all admitted that a  
15 sergeant had such access to the videotape.  
16  
17  
18  
19

20           The videotape would have shown Mr. Lopez's condition, and established as  
21 a fact, that his symptoms were open and obvious on July 28, 2012. Giving a state  
22 defendant with access, opportunity, and motive to destroy substantial evidence will  
23 only encourage further correctional officers to do the same. After establishing the  
24 above facts, this Court should have considered this before entering a Rule 50  
25 Judgment in the Defendants' behalf.  
26

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CERTIFICATE OF SERVICE

I hereby certify that on the 12<sup>th</sup> day of March, 2020, I electronically filed the foregoing Document with the United States District Court using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant:

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## Exhibit 1

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IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

Hector Lopez, an individual, CV-13-691-TUC-DCB  
Plaintiff,  
vs.  
Charles Ryan, et al., February 12, 2020  
Defendants. 10:48 a.m.  
Tucson, Arizona

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PARTIAL TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE DAVID C. BURY  
UNITED STATES DISTRICT JUDGE

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Proceedings Reported by Stenographic Court Reporter  
Transcript Prepared by Computer-Aided Transcription

1 P R O C E E D I N G S

2 THE COURT: All right. Counsel, have a seat.

3 All right. Mr. Carter, you have a motion at the  
4 conclusion of plaintiff's case, the plaintiff having had an  
5 opportunity to be fully heard on the allegations of his  
6 complaint.

7 MR. CARTER: Thank you, Your Honor.

8 This case sure has had a tortured path to get to  
9 trial, and obviously qualified immunity has been a big issue,  
10 and --

11 THE COURT: Well, you know, I know that's one basis  
12 for your motion.

13 MR. CARTER: Would you rather hear about --

14 THE COURT: Do you have a motion that there is not  
15 sufficient evidence to submit to the jury on the merits of the  
16 plaintiff's claim?

17 MR. CARTER: Right. That's based largely on our  
18 trial memo, just the fact that he has missed material elements  
19 of his cause of action.

20 THE COURT: So your motion is two-prong then. There  
21 are two prongs to the qualified immunity. One of them is  
22 whether the law was clearly established at the time of the  
23 action that it would have been clear to a reasonable officer  
24 that his conduct was unlawful, and my concern in the case was  
25 the plaintiff was being seen affirmatively by medical

1 professionals at the time of the alleged conduct.

2 I fail to see where the officer's conduct would be  
3 unlawful if the plaintiff is already being treated by  
4 competent medical.

5 MR. CARTER: Well, that's a big part of our  
6 argument, Your Honor, because there's been no evidence that  
7 the medical staff fell below their standard of care, so if you  
8 cannot be deliberately indifferent by being negligent or even  
9 grossly negligent, it would follow that, if you believe the  
10 nurses are doing their job, you're not going to be  
11 deliberately indifferent. If you believe they're being  
12 negligent, you're not being deliberately indifferent. And  
13 even if you think they might have dropped the ball once, at  
14 most that's negligence, and that's not breach of a  
15 constitutional right.

16 THE COURT: That would be an objectively reasonable  
17 mistake, it appears to me. This is a disease that, A, is  
18 rare, and B, is difficult is diagnosis, and C, there was at  
19 least the allegation of the inmates using hooch that would  
20 make them sick.

21 Well, the reason I'm cutting you short is I am  
22 inclined to grant a motion in this case, and so I want to make  
23 sure that I've given Mr. Weeks the opportunity to be heard, so  
24 you've said enough.

25 MR. CARTER: Thank you, Your Honor.

1           THE COURT: And Mr. Weeks, in terms of the  
2 substantive allegations here, you have to prove and a  
3 reasonable jury would have to conclude that there was  
4 deliberate indifference to the need for medical treatment, and  
5 that's defined as the defendant knew of that medical need and  
6 disregarded it by failing to take reasonable measures to  
7 address it, and deliberate indifference is defined as a  
8 conscious choice to disregard the consequences of one's acts  
9 or omissions.

10           I can't really find any evidence in this case that  
11 there was any indifference, much less a deliberate  
12 indifference, to address medical need when there was the  
13 available and the active intervention by medical personnel  
14 between July 26 and August 2.

15           You would almost be requiring these officers to  
16 overrule the health care providers at the institution and say,  
17 no, no, no, they really are suffering from a serious  
18 difficult-to-diagnosis disease, they really are, and I'm going  
19 to take them to the hospital anyway.

20           We have the first witness in this case, a -- not a  
21 doctor, but a physician's assistant, and I thought he was  
22 quite knowledgeable and credible, who testified directly  
23 that: the nursing staff at this institution was very talented;  
24 they didn't perceive any emergency, and yet you expect  
25 security officers to see that and to respond it; that the

1 disease is rare; that the disease is difficult to diagnose;  
2 that I think almost at all times the vital signs as presented  
3 by Mr. Lopez were in normal limits; that he was seen during  
4 this relevant period of time, between July 26 and August 2,  
5 six times. I thought it was five, but the witness said six  
6 times. I think that was maybe because it was a couple of  
7 visits on August 2nd, wasn't it? In any event, that's what he  
8 said.

9 He also said the nurses did everything they should  
10 have done, the officers did everything they should have done,  
11 and had Mr. Lopez been sent to the hospital, because of the  
12 nature of this disease and the difficulty in diagnosing this  
13 disease, that probably the hospital would have sent him back.

14 There was some talk by Mr. Salyer that, in other  
15 words, that this doctor wouldn't even have identified this  
16 disease, because of its symptoms and the way they wax and  
17 wane, that he, Salyer, was the guy that actually got him the  
18 necessary medical care.

19 And you expect security officers to do more than  
20 these health care providers. I mean, Mr. Lopez was sick.  
21 There's no question about that. And in hindsight, he was very  
22 sick and had a disease that could have killed him. But nobody  
23 knew that. The nurses didn't know that. A physician's  
24 assistant didn't really know that until he was sent to the  
25 hospital.

1           So even on the merits, I can't see where a  
2 reasonable jury would have sufficient -- a sufficient  
3 evidentiary basis to find, the way the law defines it, that  
4 they were deliberately indifferent. Could these folks have  
5 done better? Well, we can always do better. Were they  
6 indifferent? I don't really think they were. But even if  
7 they were indifferent, there is absolutely no evidence that  
8 they made a conscious choice to disregard the need for medical  
9 care.

10           I think if the jury -- if this case went to a jury,  
11 it would be manifest injustice for them to find liability  
12 against these security officers. So I'm looking for any basis  
13 that you can give me, Mr. Weeks, in the evidence that would  
14 support a verdict in this case on the merits, and even if you  
15 -- and even if you do that, I'm inclined to dismiss the case  
16 on the basis of qualified immunity.

17           So I'm required by the rule before I grant such a  
18 motion to make sure that you're fully heard. If there's  
19 anything you can offer me to change my mind, now's the time to  
20 do it.

21           And I might add, qualified immunity can be found at  
22 any time during the proceedings, and had I looked at the case  
23 the way I started looking at it when Salyer testified, and for  
24 whatever reason I didn't, we wouldn't even have started this  
25 trial. And I think the difference is, either it wasn't argued

1 or I did not consider well enough that it was a kind of an  
2 esoteric disease and that it would be difficult to diagnose,  
3 and I also saw some evidence that maybe some security officer  
4 denied any medical care to Mr. Lopez unless he admitted to  
5 certain things, et cetera. I just thought I'd wind up trying  
6 this case and having a jury answer a question that would  
7 pertain to qualified immunity.

8 But I don't -- as sick as Mr. Lopez was, and maybe  
9 there's a problem with the medical personnel, but that's not  
10 before me. Two security officers are before me, two security  
11 officers who are supposed to have deliberately been  
12 indifferent to Mr. Lopez's medical needs. I can't find that.

13 MR. WEEKS: Your Honor, to address that, a guard is  
14 deliberately indifferent if they know or should know that an  
15 inmate is in need of medical care and not receiving it from  
16 the health care providers.

17 THE COURT: Okay. They did get -- he did get  
18 medical care.

19 MR. WEEKS: No, it's got to be treatment, medical  
20 treatment, and treatment --

21 THE COURT: Well, they decide what medical treatment  
22 to give? I thought that's why they had a medical clinic. So  
23 a nurse or a PA or somebody that's got some expertise would  
24 decide whether or not Mr. Lopez needed treatment, not the --  
25 it would be like -- I mean, deliberate difference to me is, if

1 you want to exaggerate it on this continuum of potential  
2 facts, there is an inmate in the showers that's been shanked,  
3 and he's bleeding out on the floor of the shower. Nobody else  
4 is in there, and the officer sees him, says, well, he got what  
5 he deserved, and he walks away. That's a gross case.

6           You know, somebody that has a cough and other  
7 symptoms of flu or illness. Their vital signs are normal.  
8 They take them to the health clinic, and the health clinic  
9 doesn't send him to a hospital. They don't send him to a  
10 doctor. And these guys are supposed to do that?

11           MR. WEEKS: The undisputed testimony is that the  
12 nurses were not qualified to make that determination, Your  
13 Honor.

14           THE COURT: Well, that's not their fault.

15           MR. WEEKS: Well, but if they know or had reason to  
16 know that --

17           THE COURT: They're going to conclude that these  
18 nurses are incompetent, they don't know what they're doing,  
19 because this guy is really sick, and I need to get him to a  
20 hospital, so whatever you nurses say, I don't agree with you,  
21 I'm going to put him in a van and take him to the hospital.

22           That's just not what the law requires of them.

23           MR. WEEKS: Well, they did have to get him to a  
24 doctor, somebody who was qualified to assess and treat, and  
25 since they did not do that, I say that that is deliberate

1 indifference under the law as previously cited.

2 THE COURT: Well, that's what I thought you were  
3 saying, but I don't agree with you.

4 MR. WEEKS: I understand, Your Honor. I understand.

5 THE COURT: I'm also not being deliberately  
6 indifferent to your medical issue.

7 MR. WEEKS: Thank you, Your Honor.

8 THE COURT: I plan to get you to a doctor, because  
9 what I'm going to find, now that the plaintiff has been fully  
10 heard on the issues, that the defendants are entitled to  
11 judgment as a matter of law dismissing the complaint against  
12 them, and this case will be dismissed.

13 All right?

14 MR. WEEKS: Thank you, Your Honor.

15 MS. COLLINGS: Thank you.

16 THE COURT: When this jury gets in the jury room,  
17 I'll tell them. I'll go in there and tell them what I did,  
18 it's all my fault, and send them home.

19 Anything else?

20 MR. WEEKS: No, Your Honor.

21 MR. CARTER: No, thank you, Your Honor.

22 MS. COLLINGS: Thank you, Your Honor.

23 (Proceedings conclude at 11:03 a.m.)

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## C E R T I F I C A T E

I, Erica R. McQuillen, Federal Official Realtime Reporter, in and for the United States District Court for the District of Arizona, do hereby certify that, pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 19th day of February, 2020.

s/Erica R. McQuillen  
Erica R. McQuillen, RDR, CRR  
Federal Official Court Reporter